IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.348 OF 2005

Manohar Vinayak Rane ...Appellant

Vs.

Pandurang Vinayak Rane & Ors. ...Respondents

Mr.M.S.Karnik i/b P.B.Sawant for the Appellant

CORAM: A.S.OKA, J.
DATED: MARCH 30,2005.

P.C.:

1. Heard Shri Karnik for the Appellant. On the prayer made by Shri Karnik the Second Appeal is permitted to be converted in to an Appeal from Order. Amendment to be carried out within two weeks.

2. Heard Shri Karnik on the merits of the Appeal. The Appellate Court has passed an order of remand. The Appellant is the original Plaintiff. The Appellate Court found that an application was made by the Appellant-Plaintiff for obtaining leave under Order II Rule 2 of Code of Civil Procedure, 1908. Instead of considering the Application on merits, on the said Application the learned Trial Judge passed an order directing both the parties to maintain status quo. The Appellate Court found that no specific issue on the basis of the contention raised by the Respondent No.1-Defendant No.1 as regards Will executed by Laxmibai was framed. The Appellate Court also found that the original Defendant No.8 died during the

pendency of the suit and the Appellant-Plaintiff did not take steps for bringing the legal representatives of deceased Respondent No.8 on record. Considering all these aspects, the Appellate Court remanded the suit to the Trial Court with observation that the learned Trial Judge will consider the application made by the Appellant-Plaintiff for grant of leave under Order II Rule 2 of the said Code on merits. The Appellate Court also permitted the Appellant to file application for bringing on record the legal representatives of deceased Respondent No.8.

3. Shri Karnik submitted that there was no necessity of passing the order of remand as the learned Trial Judge has already considered the merits of the plea of Defendant No.1 based on the Will executed by Laxmibai. He submitted that the Defendant No.8 was ex parte all through out. He, therefore, submitted that order of remand was not warranted.

4. The Appellate Court has recorded a finding that the entire procedure adopted by the learned Trial Judge was wrong. Instead of deciding the application (at Exh.7) filed under provisions of Order II Rule 2 of the said Code, the learned Trial Judge has passed an order of status quo on the said application. Though there may be discussion on the plea of Defendant No.1 on the basis of the alleged Will executed by Laxmibai, the Appellate Court rightly found an error on the part of the Trial Court in failing to frame an issue on

the basis of the said Will which definitely arose out of pleadings on record. The Appellate Court instead of considering the issue of abatement of the suit as against the Respondent No.8 permitted the Appellant to file an application for bringing on record the legal representatives of deceased Defendant No.8. The Appellate Court while passing an order of remand corrected erroneous order passed on Application for grant of leave made by the Appellant and has directed the Trial Court to decide the said Application at Exh.7 on merits.

5. In view of what is stated above, in my view the order of remand was fully justified and the Appellant-Plaintiff cannot have any grievance about it. There is no merit in the Appeal. Appeal is dismissed with no order as to costs.

6. The time fixed by the Appellate Court to file application for bringing on record the legal representatives of the Defendant No.8 is extended by a period of six weeks from today.

Judge.